

Testimony of **Mark R. Taylor**
Regarding **House Bill No. 695**
before the **House Judiciary Committee**
February 21, 2007

EXHIBIT 8
2/21/07
695

Compelling State Interest Overview

Article II of Montana's constitution, entitled Declaration of Rights, enumerates various rights, among which are certain 'inalienable rights' set forth at section 3. ... While section 3 does not refer to 'fundamental rights' per se, nevertheless, we have held a right may be 'fundamental' under Montana's constitution if the right is either found in the Declaration of Rights or is a right 'without which other constitutionally guaranteed rights would have little meaning'.

Wadsworth v. State of Montana, 275 Mont. 287, 298-299, 911 P.2d 1165, 1171-1172, citing Butte Community Union v. Lewis (citations omitted) (Mont. 1996). Any statute or rule which implicates a fundamental must be strictly scrutinized. Montana Envir. Info. Center v. Dept. of Envir. Quality, 296 Mont. 207, 225, 988 P.2d 1236, 1246 (Mont. 1999). Under a strict scrutiny analysis, the State is required to show a compelling state interest for its action, to show that the State's action is tailored to effectuate only that compelling state interest, and to also show that the choice of legislative action is the least onerous path that can be taken to achieve the State's objective. Id. The Supreme Court has further articulated that the State must prove a compelling interest by competent evidence. Wadsworth, 275 Mont. at 303, 911 P.2d at 1174.

Analysis of HB 695

Opponents to this bill will likely testify that HB 695 infringes upon an injured party's fundamental right to **full legal redress** under Article II, Section 16 of the Montana Constitution. That testimony can be further summarized by two points: (1) there is no compelling state interest in requiring that economic consumption be deducted from an award or damages in a medical malpractice action; and (2) demonstrating a compelling interest entails something more than simply saying it is so - the sponsor and proponents have to prove the compelling interest by competent evidence. Assuming that the opponents to this bill can demonstrate that full legal redress is a fundamental right (contained within the Declaration of Rights - Article II), the legislative record must clearly articulate why and how the strict scrutiny test has been satisfied.

HB 695 can satisfy a Strict Scrutiny Test

1. Compelling state interest: As reflected in one of the bill's WHEREAS clauses, it is undisputable that all Montanans have a compelling state interest in the access to and the affordability of quality health care services. The proponents of HB 695 have clearly provided competent evidence to support this proposition. By way of example, Utah Medical Insurance Association (UMIA) has seen its average claims paid rise from \$182,920 to \$339,992 - AN INCREASE OF 85% in just four years. UMIA, which operates in only four states, anticipates that insurance rates may have to be increased by an estimated 34-37% to cover these shortfalls in Montana.

2. HB 695 is narrowly tailored to effectuate the compelling state interest. On its face, HB 695 applies only to damages awarded for a medical malpractice claim. It **does not** apply to any other injured party or cause of action. Testimony offered during the hearing should leave committee members with but one conclusion - HB 695 will serve to stabilize medical liability insurance premiums for those healthcare professionals providing necessary care to Montana's citizenry.

3. HB 695 is the least onerous path that can be taken to achieve the State's objective. HB 695, as initially drafted, would have applied to all actions for damages. The bill was amended to apply **only to MEDICAL MALPRACTICE CAUSES OF ACTION**. Moreover, it is important to note that HB 695 **does not** place any kind of cap on damages suffered by a patient.